

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of:)	
)	
Comments requested on A La Carte and)	MB Docket No. 04-207
Themed Tier Programming Distribution on)	
Cable Television and Direct Broadcast)	
Satellite Systems.)	

REPLY COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

John D. Goodman
Executive Director
Broadband Service Providers Association
1735 New York Avenue, N.W., Suite 700
Washington, D.C. 20006
(202) 661-3945

William P. Heaston
General Counsel
Prairie Wave Communications, Inc.
5100 So. Broadband Lane
Sioux Falls, SD 57108
(605) 965-9894

Regulatory Committee Chairman,
Broadband Service Providers Association

Dated: August 13, 2004

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
SUMMARY.....	3
DISCUSSION.....	4
I. VOLUNTARY A LA CARTE: IGNORED OR MISUNDERSTOOD.....	4
II. ECONOMIC ANALYSIS WAS NOT FULLY APPLICABLE TO VOLUNTARY A LA CARTE.....	5
III. EVALUATION OF VOLUNTARY A LA CARTE SHOULD ASSUME THE MIGRATION TO ALL-DIGITAL SYSTEMS.....	6
IV. HISTORICAL EXAMPLES OF NEW CONTENT INTRODUCTIONS DO NOT DIRECTLY APPLY TO ALL-DIGITAL VOLUNTARY A LA CARTE.....	7
V. THE CURRENT STRUCTURE: WHO HAS CONTROL, WHO SUPPORTS IT, AND WHO OPPOSES IT.....	8
VI. SOME ANALOGIES ARE APPEALING BUT REALLY DO NOT APPLY.....	9
VII. RETRANSMISSION IS A POLICY THAT NEEDS TO BE REVIEWED.....	11
VIII. BSPA MEMBERS REQUEST THE FULL ENDORSEMENT OF THE FCC AND CONGRESS FOR A MARKET TEST OF VOLUNTARY A LA CARTE.....	11
CONCLUSION.....	12

SUMMARY

The BSPA has read with interest comments filed in response to the FCC's current inquiry into A La Carte options for the MVPD industry. We conclude that most of the comments we read do not directly apply to BSPA's proposed Voluntary A La Carte structure.

Therefore, the BSPA continues to recommend that Voluntary A La Carte be considered as part of the industry's committed path to migrate to all-digital systems. The BSPA maintains its position that:

1. The current structure has significant issues that need new solutions.
 - a. Limited consumer choice
 - b. Increasing rates
 - c. Indecency issues
 - d. Consolidated control over content and its long-term implications on diversity and independent programming.
2. Mandatory A La Carte imposed on analog networks or the new digital networks or imposed as a substitute for existing bundles should be rejected.
3. It is highly preferable that the industry finds new solutions as compared to current proposals for new regulation.
4. The industry is fully committed to its migration to all-digital systems and solutions should be evaluated in the context of that expected environment.
5. Voluntary A La Carte should not be confused or equated with Mandatory A La Carte proposals. Voluntary A La Carte would not eliminate today's bundled content packages but provide additional options that are more market driven than today's structure. This current structure is dominated by a relatively small

number of large conglomerates that can dictate or highly influence the distribution of content on the most popular analog tiers.

6. Relevant market data for Voluntary A La Carte offered in an all-digital environment does not exist. There are too many unknowns to make a final judgment.
7. The BSPA and its members endorse the idea of an initial market test for Voluntary A La Carte and will volunteer to host this test on their current operating networks.
8. The BSPA seeks the full endorsement and support of the FCC in pursuing this proposed market test of Voluntary A La Carte.

DISCUSSION

I. VOLUNTARY A LA CARTE: IGNORED OR MISUNDERSTOOD

Most filed comments are not directly related to the proposed Voluntary A La Carte option. Major portions of filed comments were focused on Mandatory A La Carte, which the BSPA also rejects. Comments that casually equate Mandatory and Voluntary A la Carte miss the critical distinctions between the two. Voluntary a la Carte does not eliminate today's bundles of content – bundles that are avidly sought by many consumers. Voluntary A La Carte is not a forced choice between the existing structure and something new that will have onerous new costs in the context of the all-digital networks to which the MVPD industry is already committed to migrate.

There are several basic concepts with which the BSPA agrees. BSPA concurs with Disney that bundling or mini-tiers is a natural and economic way to offer content. BSPA agrees with Starz opinion that tiering decisions should be left to market forces. The real debate is who should influence and/or control the definition of the mini-tiers or bundles that are offered. In today's industry model both distributors and consumers have limited control or influence over those decisions. Today's structure does not allow distributors and consumers greater control or influence because the current structure so significantly constrains the distributors in how they can respond to consumer desires/demands. Voluntary A La Carte creates a structure that will give distributors new opportunities to respond to consumer requests for additional choice in what they buy. Voluntary A la Carte will create additional options for the introduction of new content.

II. ECONOMIC ANALYSIS WAS NOT FULLY APPLICABLE TO VOLUNTARY A LA CARTE

Most of the economic analyses presented to the FCC conclude that A La Carte will add new costs for all subscribers leading to unacceptably higher rates for all consumers.

However, most of these evaluations are not relevant to BSPA's proposed Voluntary A La Carte. For example, Booz Allen did a significant amount of financial modeling that does not apply to the BSPA proposal. Booz Allen incorrectly includes significant costs related to a network or to an individual customer upgrading their service to digital capability.

Booz Allen adds the current or projected cost of set-top boxes and network upgrades as an incremental cost of implementing an A La Carte option. These costs are not relevant to the BSPA proposal because such costs will be incurred anyway as part of the migration to all-digital systems. BSPA's position assumes that the industry will migrate to all-

digital platforms, sorting out both the cost and technical issues regardless of any A La Carte offerings. The cost of going to digital therefore constitutes future sunk costs and is not a major incremental cost factor to any A La Carte implementation. The true policy question is: What should A La Carte look like in the context of all-digital systems that will exist anyway?

The financial analyses submitted also assume onerous new costs related to customer service or billing operations referring to the thousands of new options created by A La Carte. This type of assumption is really responding to the most aggressive form of mandated individual channel A La Carte where every channel is offered on a pick and choose basis. The reality for Voluntary A la Carte is that it will be a fairly natural extension of the A La Carte structures that already exist to support the current digital tiers that offer either individual channels or mini-tiers of service. In Voluntary A La Carte the existing support structure for today's digital tiers has simply been expanded and extended into the current analog channels.

III. EVALUATION OF VOLUNTARY A LA CARTE SHOULD ASSUME THE MIGRATION TO ALL-DIGITAL SYSTEMS.

BSPA believes that migration to all-digital networks is still the committed direction for the industry, FCC and Congress. This migration to all-digital systems was once again confirmed by the recent FCC announced actions regarding the migration of current analog TV broadcast to digital TV broadcast during the next few years. There are significant differences of opinion as to how quickly or aggressively the MVPD industry should pursue the migration to all-digital networks. However, the BSPA does not believe

that those commenters using projected analog to digital migration costs as an argument against A La Carte support backing away from migration to all-digital platforms. It is the clear consensus that migration to all-digital platforms is inevitable. BSPA believes that Voluntary A La Carte Structures should become one of the benefits created as the industry migrates to all-digital platforms.

IV. HISTORICAL EXAMPLES OF NEW CONTENT INTRODUCTIONS DO NOT DIRECTLY APPLY TO ALL-DIGITAL VOLUNTARY A LA CARTE.

Many of the content examples that were offered as evidence that the current structure is the only or best structure to support the introduction of new niche, minority, or independent content are also not relevant to the proposed all-digital Voluntary A la Carte structure. It is true that some historical content initially offered as A la Carte was failing and then succeeded when moved to the most popular analog bundle. However, that does not mean that a similar failure would occur in an all-digital Voluntary A La Carte structure. An A La Carte channel introduction on today's digital tiers would only have access to the 10-25% of subscribers that currently have digital service. In the future all-digital structures, content providers would have access to 100% of the subscribers. In the past, content positioning was also always an "either or" choice. Content was only offered in one way on each system that carried the content. Accordingly, it should not be a surprise that any content that moved from a potential market of 10-25% of all subscribers to a guaranteed market of 85-95% of potential MVPD subscribers would find dramatically different results. A major feature of the proposed all-digital Voluntary A La Carte is the ability to offer the same content in multiple tiering options that can more fully respond to consumer desires. BSPA fully expects that a major segment of

consumers will continue to buy the very large bundles that are offered today. The BSPA is not proposing a structure in which all new content has to be introduced on a standalone basis that cannot benefit from being bundled with other content desired by consumers.

Opponents of A La Carte argue that any new content must have access to 60+ million subscribers to survive. This argument is challenged by almost all historical content introductions in today's digital tiers that have only had access to a limited segment of the potential market.

V. THE CURRENT STRUCTURE: WHO HAS CONTROL, WHO SUPPORTS IT, AND WHO OPPOSES IT.

The BSPA concurs with ACA comments describing the level of control and influence exercised by a limited number of very large conglomerates on the content that is currently packaged as the largest tier of analog content. The new content that has been introduced in this structure has been highly influenced, if not outright controlled, by these few players. ACA refers to them as the "big 5". The BSPA supports policies for the anticipated all-digital networks that will expand the opportunities for new niche, minority, and independent content that are not affiliated with these dominant players. BSPA finds it very interesting that there is a fairly consistent dividing line between those that have filed comments in support of A La Carte Options and those that strenuously opposed any form of A la Carte. Most if not all parties that have significant position, power, or active analog carriage in the current structure (NCTA, Comcast, Time Warner, Charter, Oxygen, Disney, Viacom, Discovery, etc.) are against A La Carte. Most parties that are outside of this structure (ACA, Echostar, BSPA, Consumers Union, CFA, CWA,

Parents Television Council, NTCA, NATOA, etc.) want to look at A La Carte as a potential solution to expand consumer choice, limit the consolidated control of content, expand competition, and resolve visible industry issues like indecency. Ultimately the FCC must look at policies that promote healthy competition and appropriate consumer choice and control as the nation moves to all-digital systems. The BSPA believes that migration to all-digital systems is the best opportunity to deal with these current issues.

VI. SOME ANALOGIES ARE APPEALING BUT REALLY DO NOT APPLY.

The BSPA has concerns about simplistic analogies that are used as sound bites to argue against A La Carte options. Most analogies simply do not apply to the full structure of today's MVPD industry. The grocery store analogies are examples that really do not work. The "Grocery Store" argument that "variety is good" and that programming product has to be "on the shelf" to have product distribution and consumer choice simply does not apply to the MVPD industry. This analogy might fit better if one assumes that each community has only one major grocery store and all other major grocery store chains have agreed to geographically allocate the country and not compete with each other. The grocery store then defines the packages of food that a consumer will buy and has it ready in big carts when a consumer comes into the store. The package may not have all the food the consumer wants or likes. The consumer may be allergic to some of the food, but that is OK, the consumer can throw it away when he/she gets home. There will always be at least some food that the consumer wants and there is probably some food that the consumer wants that is not available anywhere else. Food producers that are already a part of this structure love the economies and cost of doing business because

they do not have to really market their new products and rely on consumers to make active choices to buy their new product. The food producers can simply add new products to the cart and raise the price to the consumer justifying it as a clear bargain. When consumers do not like this structure and create new competition where groceries can be delivered by airmail, for example, the grocery store chains make sure that the new entrant has to offer the same types of pre-packaged food that they offer, otherwise the new competition would be unfair. The grocery store chains also look for critical products as to which they can maintain exclusive distribution. Sometimes the grocery store chains even buy the food producer so they can have better control and make sure they get the lowest cost for what they distribute. The grocery store chains also look for new services that they can put into the store that cannot be delivered by airmail.

The BSPA agrees that new content has to have some “shelf space” to be able to succeed. That does not mean that it should be pre-sold without real consumer choice. Today’s structure is defended by some as something that supports diversity and lowers net consumer prices. The long-term question is who controls the diversity and whether any truly competitive market forces are impacting price. The current structure also allows someone with market power to define a new channel of content and then assure some level of economic success by forcing the sale of that new channel to consumers who do not want it. This is not a normal, healthy competitive market structure. The proposed Voluntary A La Carte structure relates to a new environment that will create additional capacity to serve and expand diversity that is not controlled by the big 5.

VII. RETRANSMISSION IS A POLICY THAT NEEDS TO BE REVIEWED.

The BSPA agrees with DirecTV, ACA, and others that the current application of the retransmission policy is having an impact that was not intended. As applied in the market today, retransmission rights that are based on licenses granted for the free use of public spectrum should not be used as significant leverage to force distributors to carry new cable content. The definition and application of retransmission consent needs to be fully re-evaluated as the industry migrates to digital broadcast. There are several options that should be considered. One possibility is that any content tied to the retransmission requirements must be subject to the same indecency standards as the original content subject to retransmission. Another option is to limit the bundling options that can be required as part of the purchased package.

VIII. BSPA MEMBERS REQUEST THE FULL ENDORSEMENT OF THE FCC AND CONGRESS FOR A MARKET TEST OF VOLUNTARY A LA CARTE.

BSPA members are fully committed to the expected benefits of all-digital networks. BSP systems have been constructed in anticipation of this migration to all-digital networks. BSPA members are therefore willing to provide an initial market test of the proposed Voluntary A La Carte structure. A test of this nature will actually serve two valuable purposes. The first will be some additional insight into the process of migrating a system and customer base to an all-digital platform. The second value will be a market test of Voluntary A la Carte that will assess the consumer response to these new choices. BSPA members that have initially agreed to support this test include RCN, Astound Broadband, and PrairieWave Communications. We fully recognize that any initial market test of Voluntary A La Carte policy will have inherent limitations due to scale or other issues.

Despite any of these limitations, the market test will add valuable insight to many areas of the debate where there is no meaningful data for the ongoing analysis. Testing new A La Carte options was endorsed at the recent congressional hearings and during the afternoon economist session at the FCC symposium on A La Carte held on July 29, 2004.

CONCLUSION

The current policy and economic debates should not focus on Mandatory A La Carte that is forced upon existing systems. The debate should focus on the all-digital network environments that the broadband industry is already committed to implement. There are so many unknowns about this new world, the transition to it, and the potential for Voluntary A La Carte, that the BSPA continues to endorse market tests that can provide critical information to add to the debate.

Respectfully submitted,
**BROADBAND SERVICE
PROVIDERS ASSOCIATION**

By: /s/

John D. Goodman
Executive Director
Broadband Service Providers Association
1735 New York Avenue, N.W., Suite 700
Washington, D.C. 20006
(202) 661-3945

William P. Heaston
General Counsel
Prairie Wave Communications, Inc.
5100 So. Broadband Lane
Sioux Falls, SD 57108
(605) 965-9894

Regulatory Committee Chairman,
Broadband Service Providers Association

Dated: August 13, 2004